

My dog ate my homework! Relying on Covid-19 for an extension of time

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Covid-19 and the worldwide restrictions imposed as a result are inevitably having an impact on whether court deadlines can be met. What if you need to make an application for an extension of time as a result? What are the principles that the Court will apply?

That was the question for the TCC in *Municipio de Mariana v BHP Group Plc* [2020] EWHC 928 (HH Judge Eyre QC). The case is an interesting one, described as the largest class action ever brought in England. The claimants are about 202,000 individuals and 530 businesses and others, who claim against the owners of a dam in Brazil which collapsed releasing toxic materials into the Rio Doce. The claims are for physical harm, loss of earnings and other claims for damage to indigenous communities, under Brazilian law. There is, inevitably, a jurisdiction challenge based on the fact, amongst other things, that there are overlapping proceedings in Brazil.

A seven-day jurisdiction hearing was listed for June 2020. The Defendant dam owners sought an extension of time of 5 to 6 weeks for its reply evidence because of Covid-19 lockdowns in the UK and Brazil and the restrictions in travel impacting on the ability of the lawyers to take that evidence. That would require a relisting of the hearing.

The following helpful principles emerge from the case:

1. The starting point is still the overriding objective, but also PD51ZA para. 4 which provides that:

“In so far as compatible with the proper administration of justice, the court will take into account the impact of the Covid-19 pandemic when considering applications for the extension of time for compliance with directions, the adjournment of hearings, and applications for relief from sanctions.”

2. Wherever possible, hearings should not be adjourned by reason of the pandemic, and regard should be had to that if an extension of time would impact the hearing: *National*

Bank of Kazakhstan v Bank of New York Mellon (Teare J, unreported), *Re Blackfriars Ltd* [2020] EWHC 845 (Ch), and the *Civil Justice in England and Wales Protocol regarding Remote Hearings*.

3. Difficulties arising from self-isolation and from parties and their lawyers being in different locations were to be addressed robustly and parties were to be expected to take proactive measures to overcome such difficulties. Instructions can be taken on video and telephone calls, and it is not good enough to argue that the legal team is insufficiently experienced with the technology: *Re Smith Technologies* (ICC Judge Jones, unreported 26 March 2020).
4. There is a link between the approach to adjournment of trials by reason of Covid-19 and applications for extensions of time for the same reason. That is,

“where cases have been listed, that attempts are made to keep to the directions timetable where it is realistically possible to do so, without prejudicing safety or risking injustice as a result. It is against that background that paragraph 4 of PD 51ZA should be approached.”

(Heineken Supply Chain v Anheuser-Busch Inbev [2020] EWHC 892 (Pat))

5. Regard should be had to the importance of the administration of justice and to ensure that it is maintained in the current circumstances. However, that also entails a recognition of the difficulties which are involved in remote working and that tasks such as the collation and preparation of evidence are likely to take longer than would otherwise have been the case. There must be a recognition that achieving deadlines previously set will require more work on the part of the relevant lawyers in that they will have to spend longer in achieving the same result.

With all that in mind, the Court listed nine factors which would govern an application for an extension of time based on Covid-19 (at para. 32). Whilst this is lengthy, it is useful and so I set it out in full:

- i) *“The objective if it is achievable must be to be keep to existing deadlines and where that is not realistically possible to permit the minimum extension of time which is*

realistically practicable. The prompt administration of justice and compliance with court orders remain of great importance even in circumstances of a pandemic.

- ii) The court can expect legal professionals to make appropriate use of modern technology. Just as the courts are accepting that hearings can properly be heard remotely in circumstances where this would have been dismissed out of hand only a few weeks ago so the court can expect legal professionals to use methods of remote working and of remote contact with witnesses and others.*
- iii) While recognising the real difficulties caused by the pandemic and by the restrictions imposed to meet it the court can expect legal professionals to seek to rise to that challenge. Lawyers can be expected to go further than they might otherwise be expected to go in normal circumstances and particularly is this so where there is a deadline to be met (and even more so when failing to meet the deadline will jeopardise a trial date). So the court can expect and require from lawyers a degree of readiness to put up with inconveniences; to use imaginative and innovative methods of working; and to acquire the new skills needed for the effective use of remote technology. As I have already noted metaphors may not be particularly helpful but the court can expect those involved to roll up their sleeves or to go the extra mile to address the problems encountered in the current circumstances. It is not enough for those involved simply to throw up their hands and to say that because there are difficulties deadlines cannot be kept.*
- iv) The approach which is required of lawyers can also be expected from those expert witnesses who are themselves professionals. However, rather different considerations are likely to apply where the persons who will need to take particular measures are private individuals falling outside those categories.*
- v) The court should be willing to accept evidence and other material which is rather less polished and focused than would otherwise be required if that is necessary to achieve the timely production of the material.*
- vi) However, the court must also take account of the realities of the position and while requiring lawyers and other professionals to press forward care must be taken to avoid requiring compliance with deadlines which are not achievable even with proper effort.*
- vii) It is in the light of that preceding factor that the court must be conscious that it is likely to take longer and require more work to achieve a particular result (such as the production of evidence) by remote working than would be possible by more traditional methods. In the context of the present case the Defendants said that meetings conducted remotely took twice as long and achieved less than those conducted face to face. The Claimants challenged the precise calculation but accepted that such meetings would be likely to take longer and that is readily understandable particularly in a case such as the present involving large quantities of documents and requiring at least to some extent the use of interpreters.*
- viii) In the same way the court must have regard to the consequences of the restrictions on movement and the steps by way of working from home which have been taken to*

address the pandemic. In current circumstances the remote dealings are not between teams located in two or more sets of well-equipped offices with fast internet connexions and with teams of IT support staff at hand. Instead they are being conducted from a number of different locations with varying amounts of space; varying qualities of internet connexion; and with such IT support as is available being provided remotely. In addition those working from home will be working from homes where in many cases they will be caring for sick family members or for children or in circumstances where they are providing support to vulnerable relatives at another location.

- ix) *Those factors are to be considered against the general position that an extension of time which requires the loss of a trial date has much more significance and will be granted much less readily than an extension of time which does not have that effect. That remains the position in the current circumstances and before acceding to an application for an extension of time which would cause the loss of a trial date the court must be confident that there is no alternative which is compatible with dealing fairly with the case.”*

In light of those principles, the Court found the Defendant’s arguments as to the difficulties of remote working and the scale of the task as compelling. It granted the extension of time sought, with a short adjournment of the hearing to accommodate it.

Finally, it is worth noting that in *Heineken v Anheuser-Busch* (cited above) the Court effectively said (at para. 28) that lawyers were not in a position to complain too much about their difficulties in circumstances where others are saving lives, working long hours and are less well-remunerated for it! The TCC was not impressed by that, and more inclined to consider applications for an extension on their merits:

“I do not find that the comparison with other professionals working in very different circumstances assists greatly in determining the approach which should be taken to determining whether lawyers and those providing expert evidence can properly perform a particular task within a given time in particular circumstances.”

That must be right. Whilst applications for extensions of time must be seen in context, it is difficult to see why that context includes the fact that NHS workers and others are working longer, harder, for less money and in difficult conditions. It also fails to take into account that many other professionals (lawyers included) face testing circumstances at home which do not, as the Court in *Heineken* would have it, necessarily allow for the “*wheels of justice to turn at their pre-crisis rate*”. The TCC’s dose of reality about that is to be welcomed.

Indeed, the whole thrust of the TCC's approach is laudable and reflects the practical realities of lawyers, witnesses and experts currently confined to their homes. I suspect that HH Judge Eyre QC's decision in *Municipio* will become the benchmark for this type of application.

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